Supreme Court, U.S.
FILED

No. 991855 MAY 16 2000

OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1999

WILLIAM H. VIEHWEG
Petitioner

vs.

SUSAN H. MELLO
Respondent

On Petition for Writ of Certiorari
to United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM H. VIEHWEG
114 West 2nd South
Mt. Olive, Illinois 62069
Phone: (217) 999-5061
Petitioner

21PP

QUESTION PRESENTED FOR REVIEW

The question before the court is whether the Eighth Circuit Court of Appeals violated petitioner's Constitution of the United States First Amendment right to free speech and public access to judicial documents, and compromised the public's confidence in the judiciary, when the court granted Respondent Mello's motion to seal the file, summarily ordering both the Eighth Circuit court file and district court file, in their entirety, permanently sealed, to all persons, including Petitioner Viehweg, without on the record findings showing that restriction of the first amendment right of public access was necessitated by a compelling government interest, that the sealing was essential to preserve higher values, and that the order was narrowly tailored to that interest.

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CASE CITATIONS

At the district court level this case is cited as *Viehweg v. Mello* 5 F.Supp 2d 752 (E.D. Mo. 1998). On appeal to the Eighth Circuit Court of Appeals, No. 98-2732EMSL, the appellate court's opinion was issued per curiam and not published. On petition to the Supreme Court for a writ of certiorari, No. 99-1592, the case has been briefed and the petition is pending.

BASIS OF JURISDICTION

The final order sought to be reviewed was entered by the United States Court of Appeals, Eighth Circuit, on February 17, 2000 - four months after the Eighth Circuit issued its opinion.

The order seals both the Eighth Circuit court file, and the district court file, in their entirety, and applies to all persons, including the parties. It denies Viehweg any access to the court file without a prior court order, whether for purposes of appeal, or otherwise. It's immediate, and permanent.

This Court has jurisdiction to hear this petition for writ of Certiorari based upon U.S.C. 28 §1254.

CONSTITUTIONAL PROVISIONS

First Amendment of the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Throughout this case, issues have been raised and vigorously argued as to the nature and legality of Ms. Mello's self-representation, especially when she is simultaneously represented by legal counsel.

Ms. Mello maintains, that as she is a licensed Missouri attorney, and a member of the federal court bar, she can enter her appearance as legal counsel on behalf of herself. The district court and the Eighth Circuit agreed with her and accepted her appearance as legal counsel for herself. Viehweg has strongly objected on the basis that the state of Missouri does not recognize the act of a natural person representing herself in a court of law as the practice of law.

Ms. Mello also maintains, that as she is a member of the court bar, and her legal counsel is provided by her legal malpractice insurance, she is exempt from the restrictions of U.S.C. 28 §1654, which the federal courts have interpreted as barring simultaneous representation of pro se parties by legal counsel. Viehweg has strongly objected on the basis that such an exemption would be unconstitutional by restricting only Viehweg's non-attorney party class, and not Ms. Mello's attorney party class.

Ms. Mello maintains that the nature of her representation in the courts is proper. Viehweg maintains that the courts are granting Ms. Mello special and favorable treatment, unsupported by law, because she is an attorney member of the court's bar being sued for legal malpractice by a non-attorney pro se, and that such treatment amounts to partiality.

While this case was at the district court level, the only documents Mello moved to seal, and the only documents that were sealed, were the transcript and video of Mello's deposition. Although over one-hundred documents had been filed with the court, Mello never moved to seal any other document.

While this case was on appeal to the Eighth Circuit, Mello filed a motion to seal the file. Her motion was taken with the case (See Appendix A3) and ultimately denied by the panel to which the case had been submitted for disposition on the merits (See Appendix A4).

Subsequent to the Eighth Circuit's entering its final opinion on the case, Viehweg informed Ms. Mello that he intended to pursue these legal issues outside of the court action. Viehweg stated that if the court's application of law was in error, then the public had the right to know and voice its opinion. Viehweg further stated that if the court's application of law was not in error, then maybe the law needed to be changed.

Mello responded to Viehweg's statements by filing another motion to seal the Eighth Circuit file. Mello's motion contained seventy-eight pages of exhibits, and was half an inch thick. The motion did not refer to specific documents in the file, and was not supported by affidavits. It was signed and submitted by her attorney Gerard T. Noce of Noce and Buckley. Viehweg filed a response in opposition.

At the same time, Mello filed a word for word identical motion in the district court to seal its file.

At the same time, Mello filed word for word identical motions in the St. Louis County Circuit Court and the Missouri Court of Appeals for the Eastern District to seal their files, where documents from the federal cases had been submitted as evidence in a parallel state action.

On February 9, 2000, the Missouri Court of Appeals denied Mello's motion to seal its file (See Appendix A5).

On February 17, 2000, the Eighth Circuit Clerk, Michael E. Gans, at the direction of the court, summarily ordered the file sealed (See appendix A1). No hearing on the matter was held, and no findings were made. Notices of the order were addressed by the court clerk directly to appellee Mello as "Dear Counsel", and not to the attorney who had signed and submitted the motion on her behalf (See Appendix A2).

On or about February 23, 2000, Mello moved for the Missouri Appellate Court to reconsider her motion to seal the file. The motion (See Appendix A6) contains the following:

> On February 9, 2000, before this Court had knowledge that the Eighth Circuit had granted respondent's Motion to Seal, this Court denied respondent's Motion ..... Reconsideration of this Court's denial of Respondent's Motion ..... is especially proper, at least as to the ruling on the Motion to Seal, in order to achieve consistent judgments.

On February 29, 2000, the Missouri Appellate Court denied Mello's motion to reconsider (See Appendix A8). Mello abandoned her motion to seal the file in the state circuit court.

On or about April 10, 2000, Mello filed in the district court her motion to view the sealed file and copy documents.

On April 12, 2000, the district court entered its order denying as moot Mello's motion to seal the district court file insofar as the record had been ordered sealed by the Eighth Circuit (See Appendix A9). The order also granted Mello's motion to view the sealed file and copy documents with the following provision:

> "that the viewing of the file is limited to the purpose of preparing a response to the petition for a writ of certiorari, Defendant's counsel gives one day's notice to the Clerk's office of his or her intent to view the file, and the copied documents are destroyed once the response to the petition is filed."

Viehweg, being denied access to the federal court files, files this petition.

REASONS TO GRANT THE PETITION

In determining whether the first amendment right of public access extends to a particular type of proceeding, the Supreme Court considers "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *In Re Search Warrant for Secretarial Area-Gunn* 855 F.2d 569, 572-573 (8th Cir. 1988); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct 2735, 2740, 92 L.Ed.2d 1 (1986) (*Press-Enterprise II*)

Under the common law, judicial records and documents have been historically considered to be open to inspection by the public. The courts of this country recognize a general right to inspect and copy judicial records and documents. Public access to judicial records is important to the public's keeping a watchful eye on the function and operation of the judicial process and operates as a curb on judicial misconduct. *In Re Search Warrant for Secretarial Area-Gunn* 855 F.2d 569,573 (8th Cir. 1988); *Nixon V. Warner Communications, Inc.*, 435 U.S.589, 597-99, 98 S.Ct. 1306, 1312[1], 55 L.Ed.2d 570 (1978)

The first amendment right of public access to judicial records is a qualified right. Documents may be sealed if specific on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to that interest. The party seeking sealing must show that such a restriction of the first amendment right of public access is necessitated by a compelling government interest. If the court decides to seal certain documents, it must explain why sealing was necessary and why less restrictive alternatives were not appropriate. The court's findings must be specific enough to enable a superior court to determine whether its decision was proper. *In Re Search Warrant for Secretarial Area-Gunn* 855

F.2d 569,574 (8th Cir. 1988); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct 2735, 2740, 92 L.Ed.2d 1 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501,510, 104 S.Ct 819, 824, 78 L.Ed.2d 629 (1984) (*Press-Enterprise* I)

Mello's decision to not move to seal the file at the district court level, before the appeal to the Eighth Circuit, raises the presumption that there were insufficient grounds to seal any of the district court documents, other than the transcript and video of Mello's deposition which had already been sealed. The Eight Circuit's opinion denying Mello's first motion to seal the file raises the presumption that there were insufficient grounds to seal any of the Eighth Circuit Court documents.

The Missouri Court of Appeals for the Eastern District order denying Mello's motion to seal its file, and the court's order denying Mello's motion for reconsideration, raises the presumption that Mello's motion failed to raise sufficient grounds to seal any of the state court records, even though the state court records included numerous copies of the district court and Eighth Circuit court documents.

The Eight Circuit's summary order sealing the entire file of both the Eighth Circuit and the district court, to all persons, including the parties, absent any on the record findings, raises the presumption that Mello could not show, and that the court could not find, that restriction of the first amendment right of public access was necessitated by a compelling interest, that sealing was essential to preserve higher values, and that the order was narrowly tailored to that interest. It further raises the presumption that the court's order was entered solely to thwart Viehweg's first amendment right of free speech regarding, and the public's scrutiny of, the court's application of law regarding the issue of Mello's self-representation

The Eighth Circuit's notice of its order sealing the file, addressed to Ms. Mello instead of her attorney who submitted the motion, raises the presumption that it granted Mello's

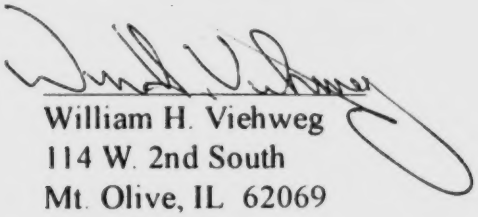
request, not based upon law, but as a professional favor to Ms. Mello as a member of its bar.

Viehweg's first amendment right to free speech has been violated by the Eighth Circuit order sealing the file. Viehweg is denied access to the file for purposes of speaking about the court's application of law regarding the issue of Mello's self-representation. Viehweg's is also prejudiced as he does not have immediate access to the file for purposes of appeal.

CONCLUSION

The law concerning the sealing of federal court documents is clear. The Eighth Circuit's order summarily sealing the entire Eighth Circuit and district court file to all persons, including the parties, without on the record findings, fails to meet the standards required to seal judicial records. Viehweg's first amendment right of free speech and access to judicial records has been violated. The public's confidence in the judiciary has been compromised. The Eighth Circuit Court order granting Mello's motion to seal the file should be reversed.

Respectfully submitted,



William H. Viehweg
114 W. 2nd South
Mt. Olive, IL 62069
(314) 999-5061
Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 98-2732EMSL

William H. Viehweg,
Appellant,
v.
Susan H. Mello,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

The appellee's motion to seal the court file has been considered by the court and is granted. The motion is denied in all other respects. (5120-010199)

February 17, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Untied States Court Of Appeals
For The Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

February 17, 2000

Ms. Susan H. Mello
Room 403
7751 Carondelet
St. Louis, MO 63105

Re: 98-2732 William H. Viehweg vs. Susan H. Mello

Dear Counsel:

Enclosed is a copy of an order entered today in the above case at the direction of the court.
(5009-010199)

Sincerely,
/s/ Michael E. Gans
Michael E. Gans
Clerk of Court

kas

Enclosure(s)
cc: Hon. Thomas C. Mummert, US Magistrate Judge
William H. Viehweg
Gerard T. Noce
James G. Woodward, Clerk

District Court/Agency Case Number(s): 4:97 CV 211 TCM

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

NO. 98-2732EMSL

William H. Viehweg,
Appellant,
v.
Susan H. Mello,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Appellee's motion for leave to file a corrected brief is granted. The brief filed November 9, 1998 is withdrawn, and the brief submitted November 12 is substituted for that brief.

Appellee's motion to seal the file is taken with the case for consideration by the panel to which this case is submitted for disposition on the merits.

November 27, 1998

Order Entered Under Rule 27B(a):

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 98-2732

William H. Viehweg,
Appellant,
v.
Susan H. Mello,
[UNPUBLISHED] Appellee.

SUBMITTED: October 7, 1999 FILED: October 18, 1999
Before BEAM, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

William H. Viehweg appeals the district court's[1] adverse grant of summary judgment in his diversity legal malpractice action against attorney Susan Mello. Mr. Viehweg alleged Ms. Mello breached her fiduciary duty and acted negligently when she withdrew from representing him in an action against his former employer. Upon de novo review, see Kunferman v. Ford Motor Co., 112 F.3d 962, 965 (8th Cir. 1997), we conclude summary judgment was proper. We believe an extended opinion is unnecessary, and we affirm the judgment of the district court. See 8th Cir. R. 47B.

We deny all pending motions on appeal.

---

[1] The Honorable Thomas C. Mummert, III, United States Magistrate Judge for the Eastern District of Missouri, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. §636(c).

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

William H. Viehweg,
Plaintiff,

v. No. 4:97CV00211 TCM

Susan H. Mello,
Defendant.

ORDER

Judgment was entered in this diversity case in favor of Defendant in May 1998. The judgment was affirmed by the Eighth Circuit Court of Appeals in a one-paragraph, per curiam opinion issued in October 1999. Pending now are three motions filed by Defendant: a motion to seal the record and for protective order; a motion for an order allowing oral argument on the foregoing motion; and a motion for order allowing Defendant to view the sealed file and copy documents. This later motion is occasioned by Plaintiff having filed a petition for writ of certiorari and the Eighth Circuit Court of Appeals having entered an order sealing the district court file at Defendant's request. Having reviewed the record and the parties' pleadings,

IT IS HEREBY ORDERED that Defendant's motion to seal the record and for protective order is DENIED as moot insofar as the record has been ordered sealed by the Eighth Circuit Court of Appeals and is DENIED in all other respects. [Doc. 135]

IT IS FURTHER ORDERED that Defendant's motion for oral argument is DENIED. [Doc. 139]

IT IS FINALLY ORDERED that Defendant's motion to view the sealed file and copy documents is GRANTED provided that the viewing of the file is limited to the purpose of preparing a response to the petition for a writ of certiorari, Defendant's counsel gives one day's notice to the Clerk's office of his or her intent to view the file, and the copied documents are destroyed once the response to the petition is filed. [Doc. 141]

/s/ Thomas C. Mummert, III
Thomas C. Mummert, III
United States Magistrate Judge

Dated this 12th day of April, 2000.

MISSOURI JUDICIARY
EASTERN DISTRICT CT OF APPEALS
Motion Rulings

Report: CZR0007

Date: 29-Feb-2000
Time: 3:08:19PM
Page: 1

ED76141

William H. Viehweg, App vs. Susan H. Mello, Res.

Motion to Reconsider
Filed by: NOCE, GERARD THOMAS

29-Feb-2000 Denied

MISSOURI JUDICIARY
EASTERN DISTRICT CT OF APPEALS
Motion Rulings

Report: CZR0007

Date: 9-Feb-2000
Time: 2:06:39PM
Page: 1

ED76141

William H. Viehweg, App vs. Susan H. Mello, Res.

Motion to Seal
Filed by: NOCE, GERARD THOMAS

9-Feb-2000 Denied

THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT.
EASTERN DIVISION

William H. Viehweg,
Appellant,

v. Appeal No. ED76141

Susan H. Mello,
Respondent.

Respondent's Motion To Reconsider Her Motion to Seal The Court File Records And For A Protective Order, And Supplemental Motion In Light Of The Eighth Circuit's Ruling Granting The Motion To Seal

COMES NOW Respondent, Susan H. Mello, by and through counsel Noce & Buckley L.L.C., and for her Motion for Reconsideration states to the Court as follows:

1. Respondent filed her Motion to Seal the Court File Records and for a Protective Order on January 26, 2000. (A copy of that Motion is attached hereto as Exhibit A.)

2. On February 9, 2000, before this Court had knowledge that the Eighth Circuit had granted respondent's Motion to Seal, this Court denied respondent's Motion. (A copy of the Eighth Circuit's ruling is attached hereto as Exhibit B.)

3. Reconsideration of this Court's denial of Respondent's Motion to Seal the Court File Records and for a Protective Order is especially proper, at least as to the ruling on the Motion to Seal[1], in order to achieve consistent judgments. This is especially proper, whereas this Court found it was without jurisdiction and with the appeal here only ancillary to the now sealed Eighth Circuit appeal.

WHEREFORE, Ms. Mello requests that this Court reconsider its prior ruling, and enter its order sealing the court file records in the above captioned case, staying any ruling on the protective order until after Judge Mummert can hear same.

---

[1] Respondent's Motion for Protective Order is awaiting hearing by Judge Mummert, United States District Court.

Noce & Buckley, L.L.C.
By: /s/ G.T. Noce
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Supreme Court, U.S.
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(2)

No. 99-1855

In The

Supreme Court of the United States

WILLIAM H. VIEHWEG,

Petitioner,

v.

SUSAN H. MELLO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent Pro Per

21pp

QUESTION PRESENTED

The question before the Court is whether the Eighth Circuit Court of Appeals violated petitioner's Constitution of the United States First Amendment right to free speech and public access to judicial documents, and compromised the public's confidence in the judiciary, when the court (after receipt of Mr. Viehweg's written opposition) granted Respondent Mello's motion to seal the file, ordering the court file permanently sealed and requiring all persons, including Petitioner Viehweg, to show good cause for access to the file.

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Viehweg v. Devereux, No. 90-2322-C(7) (E.D. Mo. 1991) 7

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Viehweg v. P. & R. Investments, 733 S.W.2d 213 (Mo. Ct. App. 1987) 7

Viehweg v. Taylor, 797 F.Supp. 751 (E.D. Mo. 1992) 7

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STATEMENT OF THE CASE

In February, 1997, William Viehweg initiated his pro se, diversity claim against Susan H. Mello, a Missouri attorney, in the United States Eastern District Court of Missouri. His suit arose out of the fact Ms. Mello wrote him she did not agree with him and would not file a lawsuit on behalf of Mr. Viehweg that she believed would violate Fed. R. Civ. P. 11. One of her reasons for believing such a violation would result from filing Mr. Viehweg's lawsuit was his stated intention to file such suits to do a book on them. *See Viehweg v. Mello*, 5 F.Supp. 2d 752 (E.D. Mo. 1998).

The district court determined that Mr. Viehweg's claim was without merit and Ms. Mello's conduct was in compliance with Fed. R. Civ. P. 11. *Viehweg v. Mello, supra.* The court granted summary judgment in favor of Ms. Mello on all counts and, pursuant to a written motion, ordered the deposition of Ms. Mello sealed. *Viehweg v. Mello, supra.* The court had earlier entered orders which limited Mr. Viehweg's direct communications with Ms. Mello.

Mr. Viehweg appealed the court's summary judgment ruling and, in a per curiam, unpublished opinion, the Eighth Circuit Court of Appeals upheld the district court's ruling. (Petition at A4). His Petition for a Writ of Certiorari was denied on May 30, 2000.

During these proceedings, Mr. Viehweg also contended that Ms. Mello could not participate in the case and questioned the form of her entry. Mr. Viehweg's motions to disqualify Ms. Mello or strike her entry in the district court and the Eighth Circuit were denied. His

March, 2000 Petition for Writ of Certiorari, Docket No. 99-1572, and his September, 1998 Petition, Docket No. 98-467, both of which addressed this issue, were also denied.

Although Mr. Viehweg had turned to the state courts in 1999, seeking an injunction from the St. Louis County Circuit Court concerning Ms. Mello's form of entry in the federal action, his appeal and his motions there were denied, as was his March, 2000 Petition for Writ of Certiorari, Docket No. 99-1572, terminating that underlying litigation.

Having been rebuffed by the courts, Mr. Viehweg then resorted to a series of increasingly threatening communications, including letters and calls, all after the prior orders, and after he had been told not to contact Ms. Mello directly. In these letters he described a planned personal attack on Ms. Mello by using the information from the court files and motions to try to hold her up to ridicule. (Brief in Opp. at App. 1-6). In one part Mr. Viehweg stated:

> I think it only appropriate that I inform you, first, of the new status of this matter.
>
> . . .
>
> The question is just how many of the thousands of Missouri attorneys will be willing to support you in public. The only way to answer that question is to put the matter before them.
>
> . . .
>
> Second, the public is currently unaware of these matters. If they were aware, would they support

> you, or be outraged? The only way to answer that question is to put the matter before them.
>
> . . .
>
> So I am about to begin a campaign to inform the legal profession, the public, and the congress, of the current status of the laws . . . Are you, and your level of competency, the new poster child for the legal profession? Are you the best the public can expect?
>
> . . .
>
> If you wonder why I am doing this, consider, that I represent the ninety-nine percent of the population that are not attorneys, and we both need and deserve better from the profession, and the courts. I believe, that once informed, we will demand it. I fail to believe that the legal profession will publicly support you and your kind. I fail to believe that the other forty-nine states will publicly support Missouri, if Missouri continues to allow you and your kind to act as you are.
>
> Until then, let the new attorney jokes deservingly fly. For instance, what is a court jester? An attorney. What is the first state to license foolery? Missouri. Who is the first attorney to publicly admit she is a licensed fool? Susan H. Mello.
>
> "The Mello Factor".

(Brief in Opp. at App. 3-6).

When Ms. Mello rightfully ignored his January 10, 2000 letter, he escalated and, on January 18, 2000, Mr. Viehweg sent a copy of that letter to twenty individuals,

most of whom have long since ended any involvement in the case. (Brief in Opp. at App. 1-6).

Ms. Mello filed a written Motion to Seal the court's file, attaching the letters, with the U.S. Eastern District Court and the Eighth Circuit. The court gave Mr. Viehweg a chance to be heard. Although he submitted a written motion in opposition, he did not ask for a hearing. The Eighth Circuit granted Ms. Mello's Motion to Seal the court's file on February 17, 2000. (Petition at A1). The U.S. Eastern District Court then effectively found the issue before it was moot wherein its files were covered by the Eighth Circuit Order. (Petition at A5-A6).

REASONS FOR DENYING CERTIORARI

Mr. Viehweg's Petition for Writ of Certiorari should be denied. The issue presented in Mr. Viehweg's Petition, whether the sealing of the Eighth Circuit's and U.S. Eastern District's court files violated his First Amendment rights, does not present any error or involve a conflict between prior Eighth Circuit rulings.

The issue presented by Mr. Viehweg does not involve any conflict between the appellate circuit courts or involve a ruling by the lower courts that, "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . " Supreme Court Rule 10(a).

Instead (as admitted by Mr. Viehweg in his Petition), such orders are left to the court's discretion where "the right to inspect and copy judicial records is not absolute."

Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978); *See also* Petition at 5. This Court in *Nixon* went on to hold:

> Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal." *In re Caswell*, 18 R.I. 835, 836, 29 A. 259 (1893). Accord, e.g., *C. v. C.*, 320 A. 2d 717, 723, 727 (Del. 1974). *See also King v. King*, 25 Wyo. 275, 168 P. 730 (1917). Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, *Park v. Detroit Free Press Co.*, 72 Mich. 560, 568, 40 N.W. 731, 734-735 (1888); *see Crowley v. Pulsifer*, 137 Mass. 392, 395 (1884) (per Holmes, J.); *Munzer v. Blaisdell*, 268 App. Div. 9, 11, 48 N.Y.S.2d 355, 356 (1944); *see also Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 158, 61 N.E. 2d 5, 6 (1945), or as sources of business information that might harm a litigant's competitive standing, *see*, e.g., *Schmedding v. May*, 85 Mich. 1, 5-6, 48 N.W. 201, 202 (1891); *Flexmir, Inc. v. Herman*, 40 A.2d 799, 800 (N.J. Ch. 1945).

Nixon v. Warner Communications, Inc., 435 U.S. at 598 (1978).

Mr. Viehweg has not shown or claimed any actual harm. He has not shown or claimed any good faith use for the material contained in the court files to which he was denied access. Instead, the court is well within its

rights to limit access where Mr. Viehweg's letters document a planned, bad faith intention. Even more so, now, there can be no harm where the underlying litigation is over, his appeals are exhausted, and for any good faith use he need simply to submit a motion to the court.

The authority for the court is reflected in the federal rules which expressly grant the courts the authority to seal discovery documents. Fed. R. Civ. P. 26(c), provides:

> the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden . . .

A court also has inherent authority and broad discretion to control its proceedings and the use of any information relating thereto in order to protect litigants. Under its ancillary jurisdiction, it has continuing authority, even in closed cases, over its files and use of its information. There is also substantive authority in Missouri law to protect parties from disclosure and publication. *Hunter v. International Systems & Controls Corp.*, 51 F.R.D. 251 (W.D. Mo. 1970). Under Missouri law, a party has a substantive right to be protected from public disclosure and use of information "for undesirable publicity purposes." *State ex. rel. Kubatzky v. Holt*, 483 S.W.2d 799 (Mo. Ct. App. 1972).

Here, such a remedy was needed. Ms. Mello is a practicing attorney. She was falsely accused by Mr. Viehweg all because she complied with her ethical duties and Fed. R. Civ. P. 11 in refusing to file a lawsuit which she believed did not meet Fed. R. Civ. P. 11 standards and

which she believed he wanted to file for improper reasons. Mr. Viehweg now seeks to use his meritless pro se suit to misuse information on her clients and practice.

As his 1999 and 2000 letters show, he not only threatened, but put into effect a personal attack on her out of some kind of continuing obsession with Ms. Mello, where after three years of his pro se litigation he cannot let go. Instead, out of malice, he is threatening to make her what he called a "poster child" for jokes and ridicule using information from court arguments and court files. (Brief in Opp. at App. 1-6). His threats are not ones that can be ignored. Instead, as even reflected in the reported cases and findings by other judges, Mr. Viehweg has a history and track record that demonstrates a pattern of malice and misuse of the courts.

This is shown in *Viehweg v. Taylor*, 797 F.Supp. 751 (E.D. Mo. 1992), where after his claim in *Viehweg v. P. & R. Investments*, 733 S.W.2d 213 (Mo. Ct. App. 1987), was found to be meritless, Mr. Viehweg personally pursued Morris Taylor, the attorney for P. & R. Investments, until that attorney had to seek a personal protective order to keep Mr. Viehweg from stalking him.

In *Viehweg v. Devereux*, No. 90-2322-C(7) (E.D. Mo. 1991), Mr. Viehweg then pursued Joe Devereux, Jr., a court appointed attorney, after Devereux withdrew from representing Mr. Viehweg. When Mr. Viehweg's claim was dismissed, as barred by the statute of limitations, Mr. Viehweg not only appealed to the Eighth Circuit (No. 91-1798), but then petitioned the U.S. Supreme Court (Docket No. 91-1220), contending the statute of limitations should not apply because it was a pro se action.

This is even more so in *Re/Max v. Viehweg*, 619 F. Supp. 621 (E.D. Mo. 1985) where Mr. Viehweg retaliated against Re/Max, his former employer. There, after Re/Max refused to capitulate to what can best be described as extortion (with Mr. Viehweg threatening to report them if they did not pay him $97,000.00 and give him a job in Florida) Judge Hungate found:

> 10. On Saturday, April 7, 1984, defendant [Mr. Viehweg] entered plaintiff's St. Louis offices and searched the desks, closets, and credenzas in the office, including the desk belonging to Beherns [Mr. Viehweg's supervisor]. Defendant removed and read various documents and then took numerous documents, papers, and records home with him.
>
> . . .
>
> 15. In late April of 1984, defendant [Mr. Viehweg] contacted Gordon Gundaker, a St. Louis area realtor and Re/Max competitor, and offered to sell Gundaker information which would help him to keep Re/Max or its franchisees from hiring away his real estate agents.
>
> 16. In October of 1984 defendant [Mr. Viehweg] sent mailings to thirty prominent St. Louis area realtors and Re/Max competitors to solicit their hiring of him as a consultant who would show them how to keep Re/Max or its franchisees from hiring away their real estate agents.
>
> 17. As a result of defendant's [Mr. Viehweg's] October 1984 mailing, defendant met with representatives of Gundaker Realty, Ira E. Berry Realty, and Century 21 Realty, wherein defendant [Mr. Viehweg] offered to sell to each of

> those real estate companies information designed to help them keep Re/Max or its franchisees from hiring away their real estate agents.
>
> 18. In a series of telephone conversations . . . on December 11, 14, and 18, 1984 defendant [Mr. Viehweg] threatened to take his allegations of Re/Max's wrongful misconduct to the Federal Trade Commission and the Illinois Attorney General unless Re/Max paid him $15,000.00 in a lump sum, plus $3,000.00 per month for twenty-four months, and assigned him plaintiff's [Re/Max's] Florida Region.
>
> 19. On February 4, 1985, defendant [Mr. Viehweg] sent a mailing to over 500 offices of Re/Max subfranchisors and franchisees in which he accused Re/Max of improper registration of its franchise salespersons, of unsound financial conditions, and of making fraudulent statistical disclosure and false earning claim.

Id. at 624-25.

As Judge Hungate found, Mr. Viehweg "did not rebut plaintiff's evidence and continued to insist that his actions were proper." *Id.* at 625. Although Re/Max was awarded a judgment of $85,000.00, it was never paid.

Here, as his own letters document his planned misuse of the court file is to humiliate and ridicule Ms. Mello to ruin her career, threatening to take away her livelihood and cause her irreparable harm, hoping to drag her into a new pro se lawsuit on his new actions.

Faced with such actions and circumstances, the Eighth Circuit rightly entered their Order sealing the file. (Petition at A1).

While his Petition alleges that he was "denied access to the federal court files", (Petition at 4), and "does not have immediate access to the file" (Petition at 7), Mr. Viehweg has not contended he made any motion or request to view the court file. Mr. Viehweg has the same opportunity to obtain copies as Ms. Mello, by a simple motion to use file material for appellate court filings.

Mr. Viehweg has not pointed to any item he did not have. His own Writ shows that he freely attached and relied on service copies.

What Mr. Viehweg is instead seeking, as in his notebook, is to have this Court allow him to profit from his bad faith filing of the lawsuit to obtain and then use the information for more bad faith purposes.

The Eighth Circuit's decision was well within its discretion to seal its file. There is no deprivation of any Constitutional or other rights. It is well within their rules and duty owed to see that the courts are not misused. This is especially so where this litigation itself arose out of Ms. Mello's mandated compliance under Fed. R. Civ. P. 11.

CONCLUSION

For the reasons set forth above, the Eighth Circuit's decision to seal the court file was proper and Mr. Viehweg's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

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Respondent Pro Per

William H. Viehweg
114 W. 2nd South, Mt. Olive, Il 62069
(217) 999-5061

January 18, 2000

Enclosed you will find a copy of a letter I recently faxed to Susan H. Mello. The letter is self-explanatory. You have been provided a copy, as a courtesy, as you are listed below as among those who have supported Ms. Mello in her contention that she can act as legal counsel for herself.

Please do not respond to me unless 1) you are incorrectly included in the list; 2) you no longer support Mello's contention; 3) you wish to provide additional legal argument in support of Mello's contention, and 4) you do so

via written letter. Future courtesy notices from me will be addressed only to Susan H. Mello.

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Sincerely,

/s/ William H. Viehweg
William H. Viehweg

William H. Viehweg
114 W. 2nd South, Mt. Olive, Il 62069
(217) 999-5061

January 10, 2000

Fax: 314-863-7779

Susan H. Mello
7751 Carondelet, Suite 403
St. Louis, MO 63105

RE: Viehweg v Mello

Ms. Mello,

I think it only appropriate that I inform you, first, of the new status of this matter. You have insisted on representing yourself as legal counsel for yourself. Multiple attorneys have argued in multiple courts that you have that legal right, and multiple judges have recognized you in that status, yet neither cite law and no opinions have been rendered that become law.

I firmly disagree that you have the legal right to such status. Further, I fail to believe that either you or your other attorneys believe that you do. I also fail to believe that the judges believe that you have that legal right. So the question becomes, why have you been allowed to represent yourself as legal counsel?

There are two possible answers. First, that by some quirk in the current law, you can. Second, that by the current law, you can't. So, I am proceeding in such manner that it won't really matter which possibility is correct.

First, though you have had several tag-team attorneys arguing in your support in court, the question is just how

many of the thousands of Missouri attorneys will be willing to support you, in public. The only way to answer that question is to put the matter before them. Major legal questions will have to be addressed, such as:

> Do you have an attorney/client, principle/agent, contractual relationship with yourself, and does Missouri recognize such relationships within a single person, and if so, why?
>
> Is self-representation by a natural person the practice of law, or not, and if so, then is my self-representation the illegal, or legal, practice of law?
>
> Though we have only dealt with civil cases, must we not conclude that if you were a defendant party in a criminal case, your self-representation would also be as legal counsel for yourself? Why would Missouri allow that?
>
> If the act of self-representation by an attorney is the practice of law, then an attorney can only represent herself as legal counsel, as she is precluded, by definition, from acting pro se. Is that constitutional?
>
> What is the legal definition of pro per, and what is the source of the definition?
>
> If attorneys can represent themselves as legal counsel in legal malpractice cases, won't their malpractice insurance be "forced" to pay the defendant attorney's self-generated legal bills? Is it constitutional for an insured to "profit" from her own malpractice?
>
> What value does the public derive from attorneys being able to represent themselves as their own legal counsel?

Second, the public is currently unaware of these matters. If they were aware, would they support you, or be outraged? The only way to answer that question is to put the matter before them.

Third, no law states that an attorney's self-representation is the practice of law, or that an attorney has the legal right to act as her own legal counsel. As so many attorneys and judges have allowed you to do so, might not a good portion of the public conclude that your acts constitute an arrogant conspiracy of attorneys and judges to defraud justice in an attempt to protect their own.

Fourth, this matter might best be addressed by the legislature. If the current law is indefinite, or simply being ignored, then perhaps once the members of congress become aware of this, they will respond to their constituent's demands for legislation specifically prohibiting the practice.

Ms. Mello, you have already admitted, through your own attorney's expert argument, that your acting as you own legal counsel is foolish. I doubt the good people of Missouri would have a problem with you choosing, as an individual, to act in such a manner that they may consider foolish. But I do believe that the good people of Missouri will be appalled at the thought that the State of Missouri licenses such foolery. Wouldn't that render all attorneys fools? And by deduction, all judges, and most of the members of congress? Can there be a "professional" fool? Why would an intelligent person pay for advice, an[sic]/or heed the advice, from a fool?

Though I will be pursuing this matter in court, I expect no justice. So I am about to begin a campaign to inform

the legal profession, the public, and the congress, of the current status of the laws concerning this matter. I believe they have a right to voice their informed opinion. Are you, and your level of competency, the new poster child for the legal profession? Are you the best the public can expect?

I am saddened that you insist in acting as you are. I anticipate that the public will be outraged, that ultimately your version of the law will not be upheld, and that the acts by you and your following will be condemned and punished by both the public and the profession.

If you wonder why I am doing this, consider, that I represent the ninety-nine percent of the population that are not attorneys, and we both need and deserve better, from the profession, and the courts. I believe, that once informed, we will demand it. I fail to believe that the legal profession will publicly support you and your kind. I fail to believe that the other forty-nine states will publicly support Missouri, if Missouri continues to allow you and your kind to act as you are.

Until then, let the new attorney jokes deservingly fly. For instance, what is a court jester? An attorney. What is the first state to license foolery? Missouri. Who is the first attorney to publicly admit she is a licensed fool? Susan H. Mello.

"The Mello Factor".

Sincerely,

William H. Viehweg

(3)

No. 99-1855

Supreme Court, U.S.
FILED
JUN 27 2000
CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1999

WILLIAM H. VIEHWEG
Petitioner

vs.

SUSAN H. MELLO
Respondent

On Petition for Writ of Certiorari
to United States Court of Appeals
for the Eighth Circuit

PETITIONER'S BRIEF IN REPLY

WILLIAM H. VIEHWEG
114 West 2nd South
Mt. Olive, Illinois 62069
Phone: (217) 999-5061
Petitioner

4pp

REPLY ARGUMENT

Respondent does not dispute that for the Eighth Circuit to seal a document subject to the common law right to inspection, the Eighth Circuit must first, as outlined by this Supreme Court, make findings that: 1) are on the record, 2) demonstrate that restriction of the first amendment right of public access is necessitated by a compelling government interest to preserve higher values, 3) demonstrate that the closure is narrowly tailored to that interest and explain why less restrictive alternatives were not appropriate, and 4) are specific enough to enable this superior court to determine whether the Eighth Circuit's decision was proper. Further, the Respondent does not dispute that the Eighth Circuit was fully aware of this long held requirement.

Respondent does not dispute that the common law right to inspection applies to the sealed documents at issue.

Respondent does not dispute that the Eighth Circuit used the most restrictive of closures. As opposed to simple redaction of a document, or the sealing of a single document, or the sealing of a set of documents of similar information, or even the sealing of a class of documents (such as discovery), the court sealed the entire file, court orders included, to all parties and persons, permanently.

Respondent does not dispute that the Petitioner objected to the sealing, that no affidavits accompanied Respondent's

motion to seal, that no hearing was held on the matter, and that no on-the-record findings where made to enable this court to determine whether the summary order sealing the entire file was necessary and appropriately tailored, as required by law.

Respondent does not dispute that the Eighth Circuit, in its prior final opinion, had denied an earlier motion by the Respondent to seal the file. Such a denial is res judicata proof that the file did not require sealing.

Respondent does not dispute that the Missouri Court of Appeals for the Eastern District repeatedly denied her motion to seal its file, even after being informed, by the Respondent, that the Eighth Circuit had granted her identical motion to seal the Eighth Circuit file, and after being advised, by the Respondent, that the rulings should be "consistent". Such a denial is res judicata proof that Petitioner's alleged improper conduct and motivation was not so allegedly improper as to warrant sealing of the file.

Respondent does not dispute that the Eighth Circuit order sealing its entire file is unlawful. Instead, the Respondent argues that it is within the Eighth Circuit's discretion to ignore the law, and that it is within this Court's omnipotent powers to surmise the findings the Respondent desires to have made. The absence of on-record-findings by the Eighth Circuit court is proof that no such findings, as would be required to justify sealing of the entire file, could be made.

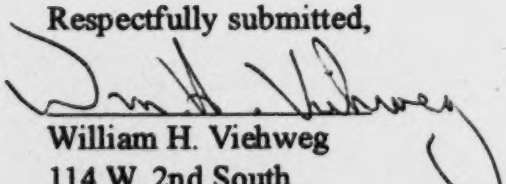
Respondent does not dispute that her own request to view the sealed file necessitated a motion submitted by her attorney, that two days lapsed before the judge approved the motion, and that an additional days notice to the clerk was required prior to the actual viewing. And yet, inexplicably, the Respondent argues that this delay constitutes "immediate" access.

Respondent misrepresents the underlying issue before this Honorable Court as a mere civil conflict between the Petitioner and the Respondent. Per common law, the sealing of court documents is first and primarily an issue of trust between the courts and the public. On any coming day, or number of days, any member, or number of members, of the public, or media, upon being denied immediate access to the sealed file at issue, and upon learning that the entire file was sealed with no supporting on-the-record findings in violation of common law, can, should their mere curiosity be raised, move to unseal the file, and if denied, begin the appeals process, anew, only this time, argued by a competent law firm. What say the Respondent, then? How stands the issue of trust between the courts and the public, then?

CONCLUSION

The Respondent provides no viable legal argument that the Eighth Circuit court's order sealing the file is not in blatant violation of common law. Petitioner's right to immediate access to the file has been wrongfully denied him. This Court's obligation to the public's trust and right to know requires that the petition for writ of certiorari be granted, and that the lower court order be reversed.

Respectfully submitted,



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